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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PACIFIC LIVE STOCK COMPANY (a Corporation),
Plaintiff in Error,
vs.
THE WARM SPRINGS IRRIGATION DISTRICT (a Municipal Corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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THE RECORDER COMPANY, 660 STEVENSON ST., S. F.

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Statement of the Case.

This is an action brought by The Warm Springs Irrigation District to condemn a certain ranch of defendant, Pacific Live Stock Company, known as its Warm Springs Ranch, as a reservoir site for the use of the plaintiff. The plaintiff's complaint (Trans., pp. 7-14) alleges the organization of the plaintiff irrigation district, the corporate capacity of the defendant, the intention of the plaintiff to irrigate thirty thousand acres or more of land, the making of surveys and the location of a dam site and reservoir. It then alleges that the dam site is fourteen hundred feet south of the south line of the defendant's property, but that the plaintiff has located "the highest flow line" upon the defendant's land, and that

> "such lands lie in such position with reference to said dam and reservoir site as that about two thousand five hundred (2,500) acres of said land as hereinafter particularly described will be submerged at said high flow line by waters to be stored by the said dam and reservoir of the plaintiff, and that practically the whole of said lands are needed by and are necessary for the purposes of the plaintiff, and it is necessary that plaintiff should have, and it requires, all of said lands for such public use for irrigation purposes."

After describing the lands of defendant and the failure to agree as to the value thereof, it prays that "said lands" be condemned, and so forth. The complaint contains no allegation of any appropriation made by the plaintiff of any waters to be stored in the reservoir, nor does it allege any application made by the plaintiff to the State Engineer for a permit to appropriate any such water. The defendant moved the court for an order requiring the plaintiff to make its complaint more definite and certain in the following particulars:

> "1. By alleging whether it seeks to acquire the fee simple title to said land, or merely an easement over the same.
>
> "2. By alleging wherein it is necessary for the plaintiff to acquire the fee simple title to said land rather than an easement thereon.
>
> "3. By alleging what portion of the said land will be overflowed by the plaintiff." (Trans., pp. 23-24.)

The defendant also demurred to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action against the defendant,

and that the defendant had not the legal capacity to maintain the action. (Trans., pp. 26-27.)

It will be seen that by the motion to make the complaint more definite and certain the defendant raised the point that the complaint did not show whether an easement or the fee was desired to be acquired, and that there was nothing in the complaint showing that a fee was necessary, as it was only desired to overflow the land to a certain extent which could as well be accomplished by acquiring an easement.

The motion and demurrer were overruled. (Trans., p. 28.) The defendant answered (Trans., pp. 29-42), alleging that the plaintiff had never appropriated any water for the reservoir in question nor obtained any permit from the State Engineer to appropriate or reservoir any waters. (Trans., p. 30.) The answer also denied that the lands were necessary for the purposes of the plaintiff, "and it also alleges that the said plaintiff only requires at most an easement in and over the said lands for the purposes aforesaid." (Trans., p. 31.) The answer alleged that the lands were of the value of three hundred thousand dollars; that the lands were a part of a larger tract of land, about one thousand acres of which were not taken by the condemnation, and that those lands would be damaged in the sum of ten thousand dollars by being severed from the lands taken. (Trans., pp. 35-36.) It also alleged that the lands were suitable to be used as a reservoir site, and that the defendant owned other lands shortly down the river, known as the Harper Ranch, and that by reservoiring the waters in this

reservoir they could be used for the further development of the Harper Ranch, and that by severing this land from the other property owned by the defendant there would be additional damage in the sum of one hundred thousand dollars caused to the defendant. (Trans., pp. 36-37.) It was also alleged by an amendment to the answer that at the time of the commencement of the action there was a thousand tons of hay upon the land which it had been intended to feed during the winter of 1919-20, and that on account of the condemnation it would be necessary to remove that hay, causing a loss of seventy-five hundred dollars. (Trans., pp. 40-41.) The defendant filed a reply which did not put in issue the allegation of the answer to the effect that the plaintiff only required at most an easement in the land, but denied all the other allegations of the answer. (Trans., pp. 43-45.)

The case was tried before the court sitting without a jury. The court fixed the value of the property at ninety thousand dollars. The court allowed nothing by way of damages to the thousand acres of land which were not taken, and allowed no damages in connection with the removal of the hay. (Trans., p. 51.) In its opinion the court said:

> "It is not necessary nor do I deem it proper to determine at this time whether such appropriation will amount to the taking of the fee or only an easement. Judgment will follow the language of the statute appropriating the property for reservoir purposes. (Sec. 6886, Lord's Oregon Laws.) The legal effect can be determined when the question arises, if it ever does." (Trans., pp. 51-52.)

Formal findings were filed, finding that it is necessary that plaintiff should have "said lands for such public use for irrigation purposes"; finding that the plaintiff on February 14, 1916, had made application to the State Engineer for a permit to appropriate the necessary waters; findings that the defendant would not be damaged with respect to the thousand acres of adjoining land, nor with respect to the hay on the property, and finding the market value of the lands to be ninety thousand dollars. (Trans., pp. 52-60.)

Judgment was entered on these findings by which the lands were appropriated "for a public use for reservoir and irrigation purposes and as a part of its irrigation system forever, and the same and the whole thereof shall be and is the property of plaintiff." (Trans., pp. 61-64.)

The defendant moved for a new trial, specifying that the decision was against law, and also insufficiency of the evidence with respect to all material findings in the case, and, among other things, contending that the undisputed evidence in the case showed that the highest use to which the land was adapted was for reservoir purposes, and that for that purpose the land was worth two hundred and fifty thousand dollars; that the ranch for hay and stock purposes was worth at least one hundred and forty thousand dollars; that damages should be allowed for the separation of the land from the neighboring land, and for the removing of the hay; that the court erred in permitting certain witnesses for the plaintiff to testify as to the value of the land, as they were not competent, and also that the court erred in finding

that it was necessary for the plaintiff to take the land for the reason that it was apparent that it was only necessary to take an easement. (Trans., pp. 64-67.) This motion was denied. (Trans., pp. 28-29.)

All the proceedings on the trial were thereupon embodied in a bill of exceptions and are brought here by writ of error.

Assignment of Errors.

1. The court erred in overruling and denying the defendant's motion to make the complaint more definite and certain, for the reason that the said complaint did not set forth whether the plaintiff sought to acquire the fee simple title to the land described in the complaint or an easement therein, and it was impossible to determine from the said complaint whether the said plaintiff sought to acquire an easement in said land or the fee simple title thereto.

2. The court erred in overruling the demurrer to plaintiff's complaint, for the reason that said complaint did not set forth that the said plaintiff had made any appropriation of the waters of the Malheur River, or of any waters for the said reservoir, or that it had obtained from the authorities of the State any permit for the appropriation of any waters for said reservoir.

3. The court erred in granting judgment in said cause without deciding or specifying whether the plaintiff acquired thereby the fee simple title of the said land, or only an easement therein.

4. The court erred in granting judgment to the plaintiff, for the reason that it appeared on the trial

that the said plaintiff had not, prior to the commencement of said action, appropriated any water of the Malheur River, or obtained from the State Engineer of the State of Oregon any permit for such appropriation.

5. The court erred in permitting the plaintiff to show what particular lands would be overflowed, for the reason that the complaint should have indicated the lands which were intended to be overflowed, and in this particular defendant states that the complaint did not show what particular lands would be overflowed by the plaintiff, and the defendant moved to make the complaint more definite and certain in that particular, which motion was overruled by the court, and thereafter, over the objection of the defendant, permitted the plaintiff to show what lands would be and what lands would not be overflowed by it.

6. The court erred in overruling defendant's objection to the following question propounded to the witness J. C. Foley:

> "Q. Do you know of the sale in your neighborhood at a price which any way assisted you in reaching your conclusion as to the price of this ranch?"

And in this regard the defendant states that the said witness, J. C. Foley, was a witness called on behalf of the plaintiff, for the purpose of testifying to the value of the lands described in said complaint, and by the said question the said witness was permitted on direct examination to testify to the sale of other pieces of land and the prices at which the same were sold.

7. The court erred in overruling the defendant's objection to the following question propounded to the witness J. C. Foley:

> "Q. How much did that soil produce to the acre?"

And in this behalf defendant states that the said witness, J. C. Foley, was a witness called on behalf of the plaintiff, for the purpose of testifying to the value of the lands described in the said complaint, and by this question was permitted to testify and did testify on direct examination to the productivity of other lands, as to the sale of which he was permitted to testify.

8. The court erred in overruling defendant's objection to the following question propounded to the witness James Morfit:

> "Q. State what the fair market value of that thirteen hundred acre fenced ranch is."

And in this regard defendant states that the said witness, James Morfit, was a witness called on behalf of plaintiff, for the purpose of testifying to the value of the lands involved in this suit, and by said question was permitted on direct examination to testify to specific sales and the value of specific lands not involved in said suit.

9. The court erred in overruling the defendant's objection to the following question propounded to the witness James Morfit:

> "Q. How does it compare as range and pasture land with range and pasture lands you saw on the Warm Springs Ranch in November?"

And in this regard defendant states that the said witness, James Morfit, was a witness called on behalf of plaintiff, for the purpose of testifying as to the value of the lands described in the said complaint, and by this question was permitted to testify as to the range and pasture on certain specific lands other than the lands described in the complaint, and to give the value and productivity of such specific tracts of land.

10. The court erred in overruling the objections of the defendant to the qualifications of the witness C. C. Hunt to give an opinion as to the value of the said property, and in this regard defendant states that the said witness, C. C. Hunt, was a witness called on behalf of plaintiff, for the purpose of testifying as to the value of the land described in the complaint, and he did testify as to such value, and it appeared on the examination of the said witness that he lived one hundred and sixteen miles away from the said property, and had never seen it, except on two occasions in the winter time, after this litigation arose, when he went there for the express purpose of examining the same, and he testified that he had never owned any land within one hundred and sixteen miles of this land, had never bought or sold any land within one hundred and sixteen milees of this land, did not know the sale price of any land within one hundred and sixteen miles of this land, had never wintered any cattle on the ranch and had never wintered any cattle within one hundred and sixteen miles of the Warm Springs Ranch, and did not know the number of cattle wintered nor the amount of hay produced on it from year to year, nor had he ever bought

or sold any hay within one hundred and sixteen miles of the Warm Springs Ranch, and did not know the value or price of the hay on the ranch, and thereupon the defendant objected to the testimony of said witness, and objected that he was not qualified to give an opinion as to the value of said property, which objection was overruled.

11. The court erred in overruling the objections of the defendant to the qualifications of the witness J. F. Weaver to testify and give an opinion as to the value of said land, and in this regard defendant states that the said witness, J. F. Weaver, was a witness called on behalf of plaintiff, for the purpose of testifying as to the value of the land described in the complaint, and he did testify as to such value, and it appeared on the examination of the said witness that he lived one hundred miles away from the said property, and had never seen it, except on two occasions in the winter time, after this litigation arose, when he went there for the express purpose of examining the same, and he testified that he had never owned any land within one hundred miles of this land; had never bought or sold any land within one hundred miles of this land; did not know the sale price of any land within one hundred miles of this land; had never wintered any cattle on the ranch and had never wintered any cattle within one hundred miles of the Warm Springs Ranch, and did not know the number of cattle wintered nor the amount of hay produced on it from year to year, nor had he ever bought or sold any hay within one hundred miles of the Warm Springs Ranch, and did not know the

value or price of the hay on the ranch, and thereupon the defendant objected to the testimony of said witness, and objected that he was not qualified to give an opinion as to the value of said property, which objection was overruled.

12. The court erred in overruling the objections of the defendant to the qualifications of the witness E. M. Greig to testify and give an opinion as to the value of said land, and in this regard defendant states that the said witness, E. M. Greig, was a witness called on behalf of plaintiff, for the purpose of testifying as to the value of the land described in the complaint, and he did testify as to such value, and it appeared on the examination of the said witness that he lived one hundred miles away from the said property, and had never seen it, except on two occasions in the winter time, after this litigation arose, when he went there for the express purpose of examining the same, and he testified that he had never owned any land within one hundred miles of this land, had never bought or sold any land within one hundred miles of this land, did not know the sale price of any land within one hundred miles of this land, had never wintered any cattle on the ranch and had never wintered any cattle within one hundred miles of the Warm Springs Ranch, and did not know the number of cattle wintered nor the amount of hay produced on it from year to year, nor had he ever bought or sold any hay within one hundred miles of the Warm Springs Ranch, and did not know the value or price of the hay on the ranch, and thereupon the defendant objected to the testimony of said witness,

and objected that he was not qualified to give an opinion as to the value of said property, which objection was overruled.

13. The court erred in overruling the objections of the defendant to the admission in evidence of the application and permit of the plaintiff to appropriate water, for the reason that the said matter was not within any issue framed by the pleadings, and the same was done after the filing of this suit, and in this regard the defendant states that, notwithstanding this court overruled the demurrer to the complaint, and, although there is no allegation of the appropriation of any water by the plaintiff, the court permitted the defendant to introduce into evidence an alleged appropriation of the said water by the plaintiff, made after the commencement of this action.

14. The court erred in limiting the damages to the plaintiff to the value of the said land for agricultural purposes, and in this regard defendant states that the undisputed evidence in the suit was that the highest use to which the said land was adapted was as a reservoir site, and that for such purpose it had a value of two hundred and fifty thousand dollars, and the evidence was undisputed.

15. The court erred in limiting the defendant's damages to the sum of ninety thousand dollars as the value of the said ranch, for the reason that the evidence showed that the said ranch was of the value of one hundred and forty-three thousand dollars for agricultural purposes and of the value of two hundred and fifty thousand dollars for reservoir purposes, and the evidence is insufficient to justify the finding

that the said ranch was worth only ninety thousand dollars.

16. The court erred in failing to give the defendant damages caused by the separation of said land from other land owned by the defendant, and in this regard the defendant states that the evidence showed that the said defendant was the owner of one thousand acres of land immediately adjoining the land so taken, which was acquired, owned and used in connection with the said land, and for the purpose of supplying water to the cattle wintered upon the said land, and that the said land would be damaged in the sum of ten thousand dollars by being separated in ownership from said ranch, and the evidence is insufficient to justify the finding that the said land will not be so damaged.

17. The court erred in failing to give the defendant damages in the sum of seventy-five hundred dollars, which will be caused to it in case the said land is taken, by reason of the fact that it will be necessary for the defendant to remove one thousand tons of hay therefrom and to make preparations for feeding the same, and in this regard defendant states that the evidence showed that the said ranch was used as a stock ranch for the wintering of cattle in the winter time, and that defendant had thereon about one thousand tons of hay, which it intended to feed during the winter season of 1919-20, and by reason of the taking of said property in December, 1920, it would be necessary to remove said hay therefrom and make preparations for feeding the same at some other point, at an additional expense of seventy-five hundred dollars.

18. The court erred in finding that the defendant was not damaged with respect to the one thousand tons of hay on said ranch, and in failing to give the defendant damages therefor, and in this regard defendant states that by reason of the taking of the said ranch and the necessity of removing the hay therefrom, the hay on the said ranch was damaged in the sum of seventy-five hundred dollars and reduced in value to that extent, all of which was caused by the taking of said property.

19. The court erred in failing to give the defendant damages in the sum of one hundred thousand dollars, or in any other sum, caused by the separation of the said ranch from the Harper Ranch owned by the defendant, and in this regard defendant states that the evidence showed that the said defendant was the owner of a ranch, known as the Harper Ranch, situated below the said Warm Springs Ranch, and which could be irrigated by water reservoired in the Warm Springs Reservoir, and that the defendant, by the taking of the said ranch, would be deprived of the opportunity to so reservoir the water for the irrigation of the said Harper Ranch, to defendant's damage in the sum of one hundred thousand dollars, which was shown by undisputed evidence.

20. The court erred in finding that it was necessary to a public use that the plaintiff acquire the said property, for the reason that it appeared by the evidence that it was only necessary for the said plaintiff to acquire an easement therein, and no evidence whatever was introduced showing that it was necessary for the plaintiff to acquire the fee simple title to said property. (Trans., pp. 506-515.)

Argument.

I.

(a) The plaintiff only required an easement in the lands of the defendant, and it could not condemn a greater interest therein under the laws of the State of Oregon.

(b) If the laws of the State of Oregon did permit the plaintiff to acquire the fee when it only needed an easement for reservoir purposes, such laws would be in violation of the Constitution of the United States in that they would take defendant's property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(c) The court erred in not sustaining the motion to make the complaint more definite and certain and thereby compelling the plaintiff to allege whether it sought the fee simple title to the land or only an easement therein.

(d) The court erred in failing to adjudge the particular interest in the land which it was necessary for the plaintiff to acquire.

In regard to all of these points it should be stated that the pleadings and the evidence show that the only use which the district intends to make of these lands is to flood them by constructing a dam below these lands across the Malheur River, and thus back the water up over those lands during the high stages of the river during the months of February, March and April, where they will be held until the latter part of the irrigation season, being largely drawn out during the months of July, August and September. According to the testimony of the plaintiff, even at the high-

est flow line there will be one hundred and fifty-eight acres of the land which will never be overflowed. (Trans., p. 87.) It must be obvious that as the water is drawn out more and more of the land will be uncovered, and as this ranch is situated in a range country it is obvious that the land so uncovered could be used for grazing purposes. It must be equally obvious that so far as the district is concerned, all it requires is the right to flood this land, which is merely an easement, and that for that purpose it does not require the fee.

While it does not appear in the record in this case, it might be stated that after this condemnation both the plaintiff and the defendant saw that it would be entirely feasible to enjoy the grazing privileges on this land without in any way interfering with its use for reservoir purposes, and, therefore, the plaintiff undertook to lease the grazing privileges to a sheep concern for the sum of fifteen thousand dollars. The defendant, on the other hand, claimed that the district had only acquired an easement by its condemnation, and therefore sought to enjoy the grazing privileges itself, and brought a suit in the United States District Court to enjoin the district and its lessee from interfering with it in that regard. In that case on an application for a temporary injunction Judge Bean held that the judgment in condemnation only gave the district an easement, and that the defendant was still the owner of the fee and entitled to graze the land. We attach as an appendix hereto a copy of Judge Bean's decision in that matter. The case has since been tried and finally decided in favor of the Pacific Live Stock Co.

If that decision is adhered to and affirmed on appeal these errors, of course, will become unimportant, but, as we cannot anticipate the result in that regard, we here present our authorities in support of our contentions.

I. The statutes should not be construed as permitting the taking of the fee simple title where an easement is all that is necessary.

II. The plaintiff cannot constitutionally take the fee simple title where an easement is all that is required, even if the legislature does authorize the taking of the fee.

III. The statutes of Oregon do not authorize the taking of the fee where only an easement is required.

Lord's Oregon Laws, sec. 6866;
Statutes of Oregon, 1919, chap. 267;
15 Cyc. 1018;
Washington Cemetery vs. *Prospect Park,* 68 N. Y. 591;
Nichols on Eminent Domain, sec. 358;
Nichols on Eminent Domain, sec. 150;
Lewis on Eminent Domain, sec. 449;
10 R. C. L., p. 88;
2 Kinney on Irrigation, sec. 1098;
1 Farnham on Water Rights, sec. 99a;
Clark vs. *Worcester,* 125 Mass. 226;
Reed vs. *Board of Park Commissioners,* 100 Minn. 167, 110 N. W. 1119;
Bowden vs. *York Shore Water Co.,* 114 Me. 150, 95 Atl. 779;
West Skokie Drainage Dist. vs. *Dawson,* 243 Ill. 175, 90 N. E. 377, 17 Amr. Cas. 776;
Lazarus vs. *Morris,* 212 Pa. 128, 61 Atl. 815;

Shreveport & R. R. Val. Ry. Co. vs. *Hinds,* 50 La. Ann. 781, 24 So. 287;
Idaho-Iowa Lateral & Reservoir Co. vs. *Fisher,* 27 Ida. 695, 151 Pac. 998;
Hunter vs. *Matthews,* 1 Rob. (Va.) 469;
O. R. & N. Co. vs. *Oregon Real Estate Co.,* 10 Or. 444;
Clark vs. *City of Portland,* 62 Or. 124;
Oregonian Ry. vs. *Hill,* 9 Or. 377;
Oregon vs. *Portland Gen. Elec.,* 52 Or. 502;
Oswego vs. *Cobb,* 66 Or. 587;
Lyford vs. *Laconia,* 75 N. H. 220, 72 Atl. 1085, 22 L. R. A. (N. S.) 1063;
Miller vs. *Coms'r of Lincoln Park,* 278 Ill. 400, 116 N. E. 178;
Newton vs. *Manufacturers' Ry.,* 115 Fed. 781;
McCarty vs. *S. P. Co.,* 148 Cal. 211, 82 Pac. 615;
Union Pacific Ry. vs. *Colorado Postal Tel. Cable Co.,* 30 Colo. 133, 69 Pac. 564;
People vs. *Blake,* 19 Cal. 579.

IV. These rules have been expressly applied to reservoirs.

Bowden vs. *York Shore Water Co.,* 114 Me. 150, 95 Atl. 779;
Idaho-Iowa Lateral & Reservoir Co. vs. *Fisher,* 27 Ida. 695, 151 Pac. 998;
Hunter vs. *Matthews,* 1 Rob. (Va.) 469.

V. Defendant was entitled to a clear description of the exact estate which plaintiff sought to acquire.

2 Lewis on Eminent Domain (3rd ed.), sec. 551.

II.

The court erred in admitting the testimony of the witnesses Hunt, Weaver and Greig as to the value of the ranch in question, for the reason that said witnesses are not qualified to give an opinion as to the value thereof.

As we shall point out more in detail later, the defendant produced twelve witnesses, all of whom testified that this property was worth over one hundred and forty thousand dollars for agricultural purposes, and, as we shall point out, practically all of these witnesses were men who had lived most of their lives within a few miles of this property, had known this property most of their lives, had ridden over it, were familiar with climatic conditions of the vicinity, range conditions, water conditions, and the value of hay and pasture in the vicinity of the property, as well as the value of the property itself. The plaintiff, to contradict this testimony, called three men who had formerly been in the employ of the defendant, namely, John Gilcrest, John C. Foley and George Love; one witness (James Morfit), who testified he was "not very much familiar" with the country, but who attempted to figure a value of the ranch from what cattle he thought it would carry from inspecting it; two sheep men, to-wit, Allen and McEwan, who were accustomed to hit the grazing land about the ranch pretty hard with their sheep, and one storekeeper (Drinkwater). As we shall point out later, there were many things connected with the testimony of these witnesses which very much weakens, if it does not entirely destroy, their testimony, and, as we shall

point out, the trial judge did not place any dependence upon it. This left as the main reliance of the plaintiff three witnesses, Hunt, Weaver and Greig, and the opinion of the court, which is in the record, shows expressly that it was on their testimony that the court largely based its conclusion. (Trans., pp. 49-50.) In fact, the judge, among other things, said:

> "None of the witnesses on either side, testifying as to value, except Messrs. Gilcrest, Hunt, Greig and Weaver, had an intimate acquaintance with the property or had made a careful examination thereof for the purpose of qualifying to testify as to value."

The fact of the matter is that the three witnesses in question were appointed by the district after this controversy arose to make an appraisement of the property. Prior to their appointment as such "appraisers" they had no more knowledge of the ranch than they had of the Sahara Desert. In fact, they had never seen it, nor had they been anywhere near it. Having been appointed to make this investigation, they could not find time to make it until in December, 1918, and then went to the ranch when it was raining and the ranch was covered with snow, and there spent two days in going over the ranch in that condition. A few days before the trial in November, 1919, they again returned to the ranch for one day. We may be willing to admit that they made "a careful examination thereof *for the purpose of qualifying to testify as to value,*" but we deny that they were qualified to testify to value, for the reason that quali-

fication as to value depends on knowledge of the property and its surroundings, residence in the neighborhood, the ownership of like property in the neighborhood, the sales of other property in the vicinity, and things of that kind, and a person can not qualify himself to testify as to value by going and looking at the property after a dispute has arisen as to its value.

Qualifications of the Witness Hunt.

The testimony of the witness Hunt is found at page 382 of the transcript. He testified on direct examination that he lived at Nyssa, which is on the line between Oregon and Idaho, and is situated twelve miles south of Ontario and sixteen miles south of Vale and one hundred and sixteen miles from the land in question. Before living there he lived at Umatilla. He first saw the Warm Springs Ranch on the 18th of December, 1918, and he spent two days on the property. He placed his value on it right while he was on the ground. The weather was cold and there had been a snowfall over the valley. He went back again on the 20th of October, 1919. On this qualification the defendant objected to the witness testifying (Trans., p. 388), and then further examined him as to his qualifications (Trans., p. 389), and he testified that he lived one hundred and sixteen miles from the Warm Springs Ranch; that he had never been there before his visit when he valued the land in December, 1918. He had gone through the Malheur country twice on his way to Burns, just traveling through, but on neither occasion did he see the Warm Springs Ranch.

"I have never owned any property up anywheres near the vicinity of this Warm Springs Ranch. I have never bought or sold any property up there. I do not know of any sales up there, or the prices at which any property sold in that vicinity. The closest piece of ranch property to this Warm Springs Ranch as to which I know the selling price was the place that Morfit sold over on Willow Creek. That is about ninety miles from the Warm Springs Ranch. I learned about that shortly after the sale was made about two years ago. I don't remember who told me about it. I have been to the Morfit property, but never examined it. I really have no definite knowledge as to the character of the property or its value. I cannot say that I know of any other piece of property which I know the sale value of anywhere near this Warm Springs Ranch. The Morfit place is as close as any that I know of. I never bought any hay in the vicinity of the Warm Springs Ranch. The closest to this ranch that I ever bought any hay would be where I live, which would be one hundred and sixteen miles, and the same would be true as to the sale of hay. I have never wintered any cattle or ranged any cattle anywhere near around this ranch. In fact, I never ranged any cattle at all. I bought and sold cattle. I owned ninety acres. They are enclosed alfalfa ranches. They are in a high state of cultivation. They would not be regarded as range country; of course, the land is all open back of us. I live just on the line of Idaho. (Trans., pp. 389-390.)

Qualifications of the Witness Greig.

The testimony of Greig is found at page 428. The witness Greig testified that he had lived at Ontario since 1905, and prior to that had lived in northern Iowa. He testified that he had very little business in

what is called the Malheur Valley above Vale. He owned some property near Nyssa and some property at Dead Ox Flat. He was not familiar with the Warm Springs Ranch until December 19, 1918, "but I have heard of the ranch practically ever since I have been in eastern Oregon."

> "Thereupon counsel for the defendant objected on the ground that no foundation had been laid for it; that it did not appear the witness had any knowledge of the Warm Springs Ranch prior to the time he visited it in the winter of 1918, and again in the winter of 1919; that it did not appear he had any knowledge of any sales of any land in the vicinity, or any lands closer than one hundred miles from the Warm Springs Ranch, or that he had ever farmed it or run cattle on it, or anywhere else in the vicinity, or that he had any knowledge sufficient to enable him to testify on the subject, which objection was overruled and defendant duly excepted to." (Trans., p. 440.)

On cross-examination the witness further testified:

> "I am not in the cattle business and never have been. The closest piece of property which I own to the Warm Springs Ranch is probably eighty or ninety miles away in a straight line, I think. My land is practically along the Snake River. I have never raised any cattle in this country at all or anywhere else in the valley. I have never sold any land in the immediate vicinity of the Warm Springs Ranch, but I have sold land around Vale; that it is in the neighborhood of eighty miles from the ranch. I have never bought any hay any place—I never sold any hay up there. The closest I ever sold any hay was in the Snake Valley." (Trans., p. 442.)

Qualifications of the Witness Weaver.

The testimony of Weaver is found at page 407. He likewise lived at Ontario and had also lived on Willow Creek about fifty-five miles northwest from Ontario. As to the Warm Springs Ranch he testified:

> "I don't know very much about the Warm Springs Ranch belonging to the defendant. I have been there a couple of times, but not when it was anything of a ranch, and I don't really know very much about it, except hearsay. I first saw it in the fall of 1883; there wasn't any ranch there at that time; I think there was a little cabin, possibly there was some location stakes, foundations laid there with willows. I never saw the ranch after that time at any time while I was riding through that country. I never got to the Warm Springs Ranch; I didn't see it again until December, 1918. My work as a cattleman didn't take me over the range very much from Agency on south. I wasn't over that country very much, but between that and the Willow Creek country I was very familiar with it. I have heard of cattle ranches being sold in this range that I have described, but I never did charge my mind with it so as to remember and I couldn't be accurate about the prices nor making the deals." (Trans., p. 409.)

On this testimony defendant objected to his qualifications as follows:

> "Thereupon counsel for the defendant objected on the ground that no proper foundation had been laid for the question and on the ground that the witness had not been shown to be competent or to have knowledge of the ranch for any length of time sufficient for him to know its value, nor any

knowledge of market prices of land in that vicinity." (Trans., pp. 414-415.)

Argument.

It results that two of these witnesses had never seen this ranch until the day they went up there and examined it and placed a value upon it, and the third witness had gone through that country in 1883, when it was all in an Indian Reservation and when there was no ranch there but "a little cabin, possibly there were some location stakes, foundations laid there with willows." From that time he had never seen it until he went to value it when covered with snow in December, 1918. During that time the testimony shows how that ranch and that vicinity had been developed; how ditches had been constructed; the land planted to alfalfa, grain and other crops; the land fenced and used to winter large numbers of cattle, valuable water rights acquired, and during all of this period this witness had known nothing whatever of the ranch. The other witnesses owned no land within ninety to one hundred and sixteen miles of the ranch; had bought and sold no land in the vicinity; knew nothing about the selling prices of any land in the vicinity, and had bought and sold no hay in the vicinity, nor had they wintered any cattle in that vicinity.

The evidence clearly shows the importance of location and the exceptional warm winter on this ranch which made it more valuable than lands even fifteen miles away and the fact that hay on that ranch on account of its proximity to the range was worth several dollars a ton more than hay down in Nyssa and at the

railroad. These were all matters of which these witnesses could have no knowledge because they never lived in the vicinity, nor had their business ever taken them to the vicinity.

The case is exactly the same, therefore, as if in a case involving the value of land in Portland men who had lived all their lives at Eugene should come in and testify as to value; men who had never seen the land; knew nothing of the sale price of land in the vicinity; who had never bought or sold any land in the vicinity; who had never owned any land in the vicinity, but who were simply selected to come up from Eugene and examine the land in a snowstorm and place a value upon it.

It would be the same as men at Santa Cruz or Sacramento attempting to testify to the value of real estate in San Francisco after they had testified that they had never been in San Francisco; had never seen the land; knew nothing of the sale price of the land; knew nothing of the production of the land; and, in fact, knew nothing about it until they were selected to come down and place a value upon it.

It seems to us that the trial court not only erred in permitting these persons to testify, but having permitted them to testify, gave an entirely unwarranted weight to the fact that they made during their two days' stay a more or less careful examination of the land. In other words, the defendant's witnesses had known this land ever since they were boys; they had gone back and forth over it riding over it and getting their cattle out; they had lived within a few miles of it all their lives; they had seen the crops grown upon it; they

knew what land of the same character sold for; they owned the same kind of land in the same vicinity; they knew what cattle had been wintered upon it; they knew what crops had been produced upon it, but before testifying they again visited the ranch to see what, if any, changes might have been made in it, and because they only stayed on that occasion one day, while these two men who knew nothing of the property at all stayed two days, the court in its opinion states that these men were the only ones "who had made a careful examination thereof for the purpose of qualifying to testify as to value." We do not doubt that they made all the effort they could to qualify, but qualification as to value of land does not come from a two days' stay upon it in a snowstorm. The privilege which the law gives to certain classes of people to testify as to their opinion as to value is based upon the fact that they have known the land; that they have lived near it or been in business near it; that they have gathered the knowledge as to the price at which lands of that character are bought and sold for, or it is based on the fact that they themselves have owned land in the immediate vicinity, of which they are presumed to know the value, and it has never been held that a man, no matter how smart he may be, can come from some remote territory, knowing nothing about the land or the conditions surrounding it, and by merely making an examination of it qualify himself as a witness.

Central Pac. Railroad Co. vs. *Pearson,* 35 Cal. 247, 261-2;
Reed v. *Drais,* 67 Cal. 491;

Standard Furniture Co. vs. *City of Seattle,* 57 Wash. 290, 106 Pac. 491;
Chansky vs. *Williams Construction Co.,* 114 N. Y. Suppl. 687;
Ross vs. *Commissioners of Palisades Interstate,* 90 N. J. L. 461, 101 Atl. 60;
Brown vs. *New Jersey Short Line Railway,* 76 N. J. L. 795, 71 Atl. 271;
Walsh vs. *Board of Education,* 73 N. J. L. 643, 64 Atl. 1088;
Friday vs. *Pennsylvania Ry. Co.,* 204 Pa. St. 405, 54 Atl. 339;
New York etc. Co. vs. *Fraser,* 130 U. S. 611, 32 L. ed. 1031;
Oregon Pottery Co. vs. *Kern,* 30 Ore. 328, 49 Pac. 917;
Michael vs. *Crescent Pipe Line Co.,* 159 Pa. St. 99, 28 Atl. 204;
Swan vs. *Middlesex,* 101 Mass. 173;
San Diego Land D. Co. vs. *Neale,* 88 Cal. 50, 67.

III.

The court erred in permitting witnesses for the defendant to testify as to the sale prices of specific pieces of property not involved in the case.

The witness, J. C. Foley, resided in the extreme westerly portion of Harney Valley, which is over seventy miles distant from the land in controversy. He testified that he based his value of the land on what lands were selling for in Harney Valley and the sale of the Vischer Ranch to Mr. Peterson. (Trans., p. 327.) Thereupon, over the objection of the defendant, he was permitted to testify to the price at which a particular ranch sold in his neighborhood and also the amount that that ranch produced per acre. (Trans., p. 328.)

James Morfit was likewise a witness for the plaintiff and testified that he lived on Willow Creek, which would be about sixty-six miles from the Warm Springs Ranch. He testified that he owned thirteen hundred acres of pasture land, and over the objection of the defendant he was permitted to testify to the fact that it was for sale and as to his opinion as to its market value, and also as to how it compared with the Warm Springs Ranch. (Trans., p. 352.)

These rulings, we respectfully submit, were erroneous. It is a well-settled rule that on cross-examination of a witness in order to test his testimony the adverse party may cross-examine him as to his knowledge of specific sales of other properties, but on direct examination or redirect examination such a method of examination is entirely improper.

Central Pacific R. R. Co. vs. *Pearson,* 35 Cal. 247;
Reclamation District No. 73 vs. *Inglin,* 31 Cal. App. 495, 160 Pac. 1098;
Oregon R. & N. Co. vs. *Eastlack,* 54 Ore. 196;
Pac. Ry. & Nav. Co. vs. *Elmore Packing Co.,* 60 Ore. 534.

While the authorities in the different states are in conflict on this subject we respectfully submit that the rule relied upon by us is the correct one. For the cases pro and con see

2 Lewis on Eminent Domain (3rd ed.), sec. 662;
16 Cyc., p. 1138.

The reason of this rule is that it would introduce

into the case a collateral issue which the adverse party could not well be prepared to meet.

In other words, near the end of the trial of this case at Portland, the plaintiff had a witness testify as to the value of a piece of land in Harney Valley which the witness himself testifies is "about the most inaccessible place in the United States" (Trans., p. 331), and also has this witness testify as to what that land produced per acre, and had another witness give like testimony as to land on Willow Creek in Malheur County.

It would be practically impossible without an elaborate trial for the adverse party to present to the jury the surroundings which might produce the value testified to by the witness as to the particular tracts of land. It would be necessary to go into the question of their water rights, their climate, their location with respect to range and transportation, and these are all things that the adverse party could not reasonably be prepared to do, and if it was attempted it would distract the attention of the jury from the real issue in the case.

The prejudicial character of this testimony is clear, for the witness Foley directly testified that he had based his opinion as to the value of the lands involved in this case on the sale of this particular piece of land in Harney Valley (Trans., pp. 327-328), and, he having testified to the actual sale of that land and that it was in his opinion better than the land of the defendant, the prejudicial effect produced by this testimony can readily be seen.

IV.

The court erred in refusing the defendant damages caused by the separation of the thousand acres of land of defendant from the land taken.

The evidence on this subject is to the effect that the Warm Springs Ranch is a ranch situated in the midst of a grazing country where there is a large amount of public or government range. The cattle are wintered on the ranch and in the summer time enjoy the range, and they cannot enjoy the range unless they have means of obtaining water. For this purpose isolated tracts are acquired in the range in order to enable the cattle to obtain water. About a thousand acres of those isolated tracts situated from two to four miles from the Warm Springs Ranch were owned by the defendant. The testimony all showed that they were immediately tributary to that ranch and owned for the purpose of protecting the cattle which wintered at that ranch and ranged on the adjoining range in the summer time. The testimony as to the damage which would be caused to these lands by the taking away of the Warm Springs Ranch was as follows:

The witness Jones testified that they would depreciate in value one-half. (Trans., p. 151.)

The witness Sitz testified that the value would be decreased one-third or one-half, or maybe more. (Trans., pp. 162-163.)

The witness Fairman testified that they would be depreciated fifty per cent. (Trans., p. 167.)

The witness Altnow testified that they would be

depreciated but he could not say to what extent. (Trans., p. 174.)

The witness Dunton testified that it would reduce the value of those lands pretty near the full value. (Trans., p. 178.)

The witness Woodard testified that the lands would be depreciated one-half anyway. (Trans., p. 187.)

The witness Goodman testified that if this ranch was taken the outlaying pieces would not be worth anything. (Trans., pp. 191-192.)

The witness Blackwell testified that they would be depreciated one-half. (Trans., p. 198.)

The witness Spurlock testified that it would detract from their value, but he could not say how much. (Trans., p. 213.)

The witness Peterson testified that they would be depreciated fifty per cent. (Trans., pp. 254-255.)

The witness Olsen testified to the ownership of these tracts by the Pacific Live Stock Company. (Trans., p. 245.)

The testimony generally in the record is that land of this kind is worth about ten dollars an acre, and, assuming that it was depreciated one-half, the defendant should have been allowed five thousand dollars damages with respect thereto.

The only testimony on this subject by the defendant was as follows:

The witness Love on direct examination had testified that he did not see how the taking of this land could decrease the value of this land (Trans., p. 336), but on cross-examination he admitted that those lands were more valuable in connection with the Warm

Springs Ranch and would bring more money in connection with that ranch. (Trans., p. 340.)

The witness Gilcrest gave his opinion that they would not depreciate because the cattle could still range there in the summer time. This is obviously answered by the defendant's witness Love that they would be more valuable if the cattle after ranging there could have the Warm Springs Ranch at which to winter, and this must be obvious.

The same may be said of the testimony of the witness Allen (Trans., p. 357), and the testimony of the witness McEwan, both of whom had been using these lands for watering their sheep.

It seems to us that there is no substantial conflict in the evidence, and that it clearly appears that these watering holes and isolated tracts are owned as a part of the ranch itself, and are more valuable connected with it than in any other way. The fact that these lands are not physically contiguous to the lands condemned is not material. If they are in the immediate neighborhood and are owned and operated as one property the damage to them by the severance may be recovered.

15 Cyc., pp. 729-733.

V.

The court erred in not allowing the defendant damages caused by the fact that it had a thousand tons of hay on the ranch which it would have to remove on account of the condemnation.

The judgment in condemnation in this case was

actually entered December 9, 1919, and by paying the damages assessed in court the plaintiff was then entitled to possession. (Trans., pp. 64, 524-525.)

The defendant in the previous summer had produced a thousand tons of hay which was then stacked on the property, and it was the intention to feed it during the winter of 1919-20. Obviously, there were only three things that could be done to save this hay:

(1) To bale it and take it to the railroad and sell it. The evidence shows that that would be practically prohibitive, as the cost of baling it and carrying it would absorb the value of it before it reached the market.

(2) To move it far enough off of the property so that it would not be flooded, and there make new arrangements for feeding it during the winter season.

(3) By bringing to the ranch immediately a large amount of cattle and have them consume the hay before the ranch was flooded.

This latter alternative would only be available from a legal standpoint in case the plaintiff only acquired an easement in the land. If it acquired the fee, of course, the defendant would have to vacate at once. Testimony was introduced as to the additional expense that would be caused by proceeding in either of these ways, and the evidence clearly showed that the expense would exceed the amount prayed for, namely, seven thousand five hundred dollars. The testimony on this subject is as follows:

The witness Jones testified that if it could be fed on the ranch it was worth eighteen dollars a ton, and that if it was hauled he would not give five dollars a ton for it. (Trans., pp. 151-152.)

The witness Fairman testified that the cost would be five dollars a ton or five thousand dollars. (Trans., pp. 168-169.)

The witness Altnow testified it would cost from six to seven dollars a ton or six or seven thousand dollars. (Trans., pp. 104-105.)

The witness Duntan testified that it would cost ten dollars a ton or ten thousand dollars. (Trans., p. 178.)

The witness Woodard testified that it would cost ten dollars a ton or ten thousand dollars. (Trans., p. 187.)

The witness Goodman testified it would cost eight dollars a ton or eight thousand dollars. (Trans., p. 192.)

The witness Blackwell testified that it would depreciate the hay five dollars a ton or five thousand dollars. (Trans., p. 199.)

The witness Newell testified that it would cost five dollars a ton or five thousand dollars. (Trans., p. 223.)

The witness Olsen testified what the loss would be in case a large number of cattle were brought in there to feed up the hay immediately before the land was flooded. He testified that it would cause a loss of six thousand five hundred dollars. (Trans., p. 248.)

There is no testimony contradicting this except the testimony of the witness McEwan, who testified that if he owned the hay he would take a chance on feeding it. (Trans., p. 372.) On cross-examination, however, he admitted that the hay would be very

much more valuable if it was not to be flooded; at least three dollars a ton. (Trans., pp. 373-374.)

The court, in its opinion, stated:

> "I have not included the hay now on the property. It is not sought to be condemned. It is personal property and will be no more affected by the judgment in this case than any other personal property belonging to the defendant now on the ranch." (Trans., p. 51.)

It seems to us that this is not an ordinary case of personal property on property condemned. Generally such property can readily be removed and, at any rate, has a ready market value. But this is a case of an isolated ranch; in a territory where hay is grown to be fed on the ranch where it is grown; where it is not feasible to market it, and it has no market value if it has to be carried to the railroad. This is, therefore, a direct loss proximately caused by the condemnation and is a proper element of damages.

Oregon & Cal. R. R. Co. vs. *Barlow,* 3 Ore. 311;
15 Cyc., pp. 741, 733.

VI.

The court erred in not allowing the defendant the value of this ranch based on its adaptability to use as a reservoir—the testimony being undisputed as to the value of the ranch for reservoir purposes in the sum of two hundred and fifty thousand dollars.

Only two witnesses testified as to the value of this ranch as a reservoir site. These witnesses were E. G. Hopson (Trans., p. 92), an engineer who had for

many years been in charge of the government reclamation work and who examined for the government the Warm Springs reservoir site and laid out the project which was finally taken over by the Warm Springs Irrigation District, and W. C. Hammatt (Trans., p. 124), an engineer of extensive experience in the Western States in irrigation matters, and both of whom had personal knowledge of this reservoir site. Both of these witnesses testified that they considered that for reservoir purposes the property was worth two hundred and fifty thousand dollars. It is unnecessary to review that testimony, as their competency to testify was not questioned, and their testimony on that subject is not disputed by any witnesses, nor did the plaintiff make any attempt whatever to controvert their testimony, evidently taking the position that value for reservoir purposes was not recoverable.

All of the other witnesses in the case who testified to value based their testimony entirely upon the agricultural uses of the land, and expressly testified that they did not undertake to testify as to the value of the land for reservoir purposes. (Jones, Trans., p. 157; Sitz, p. 162; Fairman, pp. 167-169; Altnow, p. 175; Duntan, p. 185; Woodard, p. 185; Goodman, p. 191; Blackwell, p. 199; Hanley, p. 206; Robertson, p. 209; Spurlock, p. 213; Daly, p. 227; Peterson, p. 254; Morfit, p. 351; McEwan, p. 371; Hunt, p. 402; and Greig, p. 461.) It should be noted that while these witnesses did not attempt to value the land for reservoir purposes, they testified that it had been considered as a reservoir site for over twenty years.

The plaintiff took the position that the value of the land for reservoir purposes, for which it was being condemned, could not be recovered, and based its contention on the decision in the case of *United States* vs. *Seufert Bros. Co.,* 78 Fed. 520. We are confident that that case does not in any way sustain the contention of the plaintiff, and that if it did it would be contrary to numerous decisions of the Supreme Court of the United States.

The following cases clearly demonstrate our right to recover the value of this land, considering the highest use to which it can be put, which obviously under the testimony is to use it as a reservoir site:

United States vs. Chandler-Dunbar Power Co., 229 U. S. 53, 33 Sup. Ct. 667;
Oregon R. & Nav. Co. vs. *Taffe,* 67 Ore. 102;
Brown vs. *Forest Water Co.,* 213 Pa. St. 440, 62 Atl. 1078;
Alloway vs. *Nashville,* 88 Tenn. 510, 135 S. W. 123;
U. S. vs. *Great Falls Mfg. Co.,* 112 U. S. 846, 28 L. ed. 846;
San Diego Land Co. vs. *Neale,* 78 Cal. 63, 88 Cal. 50;
Spring Valley Water Co. vs. *Drinkhouse,* 92 Cal. 528;
In re Bensel, 206 Fed. 369;
Gibson vs. *Norwalk,* 13 Oh. C. C. 437;
Moulton vs. *Newburyport Water Co.,* 137 Mass. 163;
Sargent vs. *Merrimac,* 196 Mass. 171, 81 N. E. 970;
Mississippi etc. Co. vs. *Patterson, 98* U. S. *403,* 25 L. ed. 206.

VII.

The demurrer to the complaint should have been sustained because the complaint did not allege any appropriation by the plaintiff of any water for the reservoir, nor any application to the State Engineer for a permit to reservoir the water. The court also erred in permitting proof of an alleged appropriation without any pleading thereof.

As we have already pointed out, the complaint alleged no appropriation by the plaintiff, nor did it allege any application to the State Engineer for a permit to appropriate or reservoir the water. It seems to be pretty well settled that where a person seeks to condemn property and it is necessary to obtain a franchise or permit from some official before it can use the property, he must obtain the same in advance and allege the obtaining thereof in his complaint.

Minn. Canal & Power Co. vs. Fall Lake Boom Co., 127 Minn. 23, 148 N. W. 561.

Notwithstanding the lack of allegation on this subject, the court in its findings found that such a permit had been obtained. (Trans., pp. 57-58.) The facts in this matter are that the State Engineer withdrew this water for the benefit of the United States on April 8, 1914. (Trans., pp. 80-81.) Thereafter, on March 5, 1919, the State Water Board assigned these withdrawal orders to the Warm Springs Irrigation District. (Trans., pp. 82-83.) Later the plaintiff attempted to introduce two documents certified by the State Engineer in the form of applica-

tions to appropriate water by the Warm Springs Irrigation District and endorsed as having been received in the office of the State Engineer on February 14, 1916 (Trans., pp. 463-469), but it was made to appear that this paper was simply made up a few days before the trial, and that the original paper was merely a withdrawal of the water for the government, and no paper at that time was filed in the name of the Warm Springs Irrigation District. (Trans., p. 471.)

The defendant relies on chapter 87 of the Laws of 1913. That act provides for co-operation between the state and national governments for the purpose of making investigations of the water resources of the State, and section 3 permits the State Engineer to withdraw water from appropriation pending the investigation. That act does not constitute the withdrawal of the water as an appropriation, nor does it authorize the assignment of any such withdrawal. In fact, if anything, the withdrawal would seem to be an absolute impediment to any appropriation by the Warm Springs Irrigation District. At all events, it did not constitute an appropriation by that district, and the mere writing up of an application to appropriate water a few days before the trial and having it certified to by the State Engineer as having been filed in 1916 could not constitute an appropriation by the Warm Springs Irrigation District, particularly when that district was not incorporated until the 29th day of May, 1918. (Trans., p. 74.) In other words, the plaintiff produces a document purporting to be an application to appropriate water by the Warm

Springs Irrigation District, solemnly certified to by the State Engineer as having been filed in 1916, when their own witness testified that he made it up himself a few days before the trial in 1919, and the Warm Springs Irrigation District was not even in existence until 1918.

VIII.

There was a conflict in the evidence as to the value of the Warm Springs Ranch for agricultural purposes; the witnesses for plaintiff testifying it was worth about fifty-five thousand dollars; the witnesses for defendant testifying it was worth about one hundred and forty-five thousand dollars; and the court fixing the value at ninety thousand dollars. We recognize that the evidence being conflicting the decision on that subject will not be reviewed by this court, but for the purpose of showing the importance of the errors committed by the court, particularly in the admission of evidence, we here briefly review the testimony as to the agricultural value, showing that a large preponderance of the evidence showed a value of over one hundred and forty-five thousand dollars for agricultural purposes.

The witness Hopson, who had investigated this project for the government and on behalf of the government collected the data for the co-operative report as to this project, testified that the agricultural value of this land was $143,350. (Trans., p. 102.)

W. C. Hammatt, a civil engineer, testified that its agricultural value was $161,913.05. (Trans., p. 131.)

William Jones testified to its agricultural value, based on its production, at $146,500. (Trans., p. 147.)

The witness Sitz testified to its agricultural value, based on its production, at $160,000. (Trans., p. 160.)

The witness Fairman testified to its agricultural value at $146,000. (Trans., p. 166.)

The witness Altnow testified to its agricultural value at $133,770. (Trans., p. 174.)

The witness Dunton testified to its agricultural value at $151,295. (Trans., p. 178.)

The witness Woodard testified to its agricultural value at $160,000. (Trans., pp. 186-187.)

The witness Goodman testified to its agricultural value at $140,995. (Trans., p. 191.)

The witness Blackwell testified to its agricultural value at from $125,000 to $150,000. (Trans., p. 198.)

The witness Hanley testified to its agricultural value at $190,000. (Trans., pp. 205-206.)

The witness Robertson testified to its agricultural value at $133,920. (Trans., p. 209.)

The witness Spurlock testified to its agricultural value at $149,600. (Trans., p. 213.)

The witness Davis testified to its agricultural value at $154,000. (Trans., p. 216.)

The witness Daly testified to its agricultural value at $175,000. (Trans., p. 227.)

The witness Howard testified to its agricultural value at $150,000. (Trans., p. 237.)

The witness Drake testified to its agricultural value at $192,000. (Trans., p. 242.)

The witness Cox testified to its agricultural value at $180,000. (Trans., p. 250.)

The witness Peterson testified to its agricultural value at $143,000. (Trans., p. 254.)

The witness Gault testified to its agricultural value at $145,917.50. (Trans., p. 259.)

Most of these witnesses lived from fifteen to twenty-five miles away from this property, and had done so for a great many years. They knew the climate, the range conditions, the water supply, the sale price of land, the sale price of hay, the number of cattle wintered upon it, and its production.

As opposed to this the defendant called the witness Gilcrest, who had formerly been a superintendent of the company, and who was so bitter against the company that he had even refused to testify in proceedings to determine the company's water rights, and the trial judge in his opinion states:

> "His testimony and estimate of value, however, must, I think, be weighed in the light of his present attitude towards the company." (Trans., p. 50.)

The witness Foley, who had formerly been an assistant superintendent of the company, but who had not seen the ranch for many years, and when he saw it it was only used for pasture, testified:

> "I never did consider that ranch as having any value beyond winter pasturage, and have had no occasion to change my mind. (Trans., p. 325.)
>
> * * * * * * * *
>
> "Mr. Hope asked me to come as a witness. He came to my ranch and asked me my idea of the ranch, and I gave it to him. I have had this idea of the value of this ranch for about twenty-five years." (Trans., p. 329.)

It is obvious from this that without seeing the ranch for twenty-five years, during which it had been

developed into an alfalfa ranch, this witness gave his estimate of its value.

The witness Love was likewise a discharged employee of the company. He testified that the property was worth from sixty to seventy thousand dollars. (Trans., p. 335.) He admitted, however, on cross-examination, that he had been asked by the company to testify in the case, and in answer to that request he asked that he be employed as general assistant superintendent of the company. (Trans., p. 338.) He told the representative of the company at that time that he thought the ranch was worth from seventy to ninety thousand dollars. (Trans., p. 339.) Certainly the testimony of such a witness is not of persuasive value.

The witness Morfit, who testified that he did not know much about the country (Trans., p. 341), attempted to place a value on it by figuring what profit he would make by placing fifteen hundred head of cattle upon it. (Trans., p. 345.) He estimated that he would make a profit of $14,400. (Trans., p. 346.) On cross-examination it was shown that on his own figures he would have in fact made a profit of $26,630, which, even if capitalized at ten per cent, would have amounted to $260,000. (Trans., pp. 349-351.)

The testimony of the witness Allen (Trans., p. 353) and the witness McEwan (Trans., p. 365) can be explained by the fact that they were sheep men with the inherent dislike for the plaintiff engaged in the cattle business.

The witness Drinkwater was merely a storekeeper.

In connection with his testimony, however, it developed that he had no information as to the water rights of the property. He admitted that if it had water rights for eleven hundred and forty-three acres it would be very valuable, as he only figured water for five hundred acres. (Trans., p. 379.) As we showed that the ranch did in fact have water rights to that extent, this entirely destroys his testimony. (Trans., pp. 263-265.)

It also appeared that the people associated with Drinkwater owned eighty acres of land in the canyon immediately north of the defendant's ranch. According to his testimony this had twelve to fifteen acres under ditch, the balance being hill land. This he was selling to the district at $3,350. Eighty acres just like it of the company's land the district appraised at three dollars an acre or two hundred and forty dollars, and, in fact, it developed that as a matter of fact that the few acres on this eighty acres which were supposed to be under ditch were partially on the company's land and not on this land. (Trans., pp. 489-490.)

The only other witnesses for the defendant were the witnesses Hunt, Weaver and Greig, all of whom testified to the lowest figures of any of the witnesses, namely, $50,877.25. We have already reviewed their testimony and showed that they were not qualified to testify, and still the opinion of the trial judge clearly shows that he was more impressed with their testimony than any of the other witnesses in the case.

In view of this situation, it is obvious that the errors in admitting their testimony, as well as the

errors in permitting other witnesses for the defendants to testify as to the amount of specific sales of other lands, were extremely prejudicial.

Range Conditions.

The following testimony shows the favorable location of this ranch with regard to a very large public range:

Jones	Transcript,	p.	148
Sitz	"	"	160
Altnow	"	"	173
Blackwell	"	"	196
Robertson	"	"	208
Davis	"	"	215
Drake	"	"	242

Water Rights.

The following testimony shows the water supply to which this ranch is entitled. The adjudication decree in the matter of the waters of Malheur River adjudicates water for eleven hundred and forty three acres from the ditches on both the east and west sides of the ranch. This is extremely important because both the witness Hunt (Trans., p. 395) and the witness Greig (Trans., p. 446) showed that they based their valuation on a very much less quantity of water, and the same is true as to the witness Drinkwater. The witness Sitz (Trans., p. 161) and the witness Fairman (Trans., p. 168) testified as to the supply of water, and the witness Armstrong testified as to the right of the company in the East Side Ditch. (Trans., p. 118.)

Climatic Conditions and Winter Feeding.

The favorable location of the Warm Springs Ranch for winter feeding is established by all of the testimony, which shows that the ranch is so situated that it is much warmer than the surrounding country, and that they can begin feeding the cattle there ~~earlier~~ later and leave off much ~~later~~ earlier than in any other part of the country. (See testimony of Jones, Trans., p. 148; Sitz, p. 160; Fairman, p. 167; Goodman, p. 191; Robertson, p. 208; Davis, p. 215; Newell, p. 221; Daly, p. 230; Miller, p. 311; Howard, p. 238; Drake, p. 242, and Peterson, p. 254.)

Classification of Lands and Crops.

The property is fully equipped with farm buildings and improvements at a value of ten thousand dollars or upwards (Trans., pp. 100, 127); has ditches on it which the witness Gilcrest himself testified cost over twenty thousand dollars (Trans., p. 315), and the following classification made by defendant shows the character of the crops raised:

Garden	4	acres
Alfalfa	303	"
Clover	73	"
Native Meadow	184	"
Rye Grass	198	"
Sage and Greasewood	453	"
Willow and Thicket	70	"
Total	1,285	"

Non-irrigable hill land.	1,275	"
	2,560	"

(Trans., pp. 96-99.)

A like classification by the plaintiff is even more favorable to the defendant:

268	acres of alfalfa land.
201	acres wild hay land.
40	acres mixed hay land.
65	acres plowed land.
335	acres rye pasture.
20	acres rye pasture.
1,251	acres fenced greasewood.
475	acres unfenced land.

Total, 2,655 acres. (Trans., p. 392.)

Evidence of Other Sales.

The evidence in the record of sales of other properties in the vicinity all tends to show that defendant's land was under-valued.

William Jones testified to one hundred and sixty acres of land selling for ten thousand dollars just above Drewsey. (Trans., p. 156.)

The witness Altnow testified that any good alfalfa land was worth one hundred and fifty dollars an acre; that he knew of sales around Ontario for three or four hundred dollars an acre; that Mr. Howard bought a ranch in the neighborhood at one hundred and fifty dollars an acre; that land sold at Agency in the neigh-

borhood of one hundred and fifty dollars an acre; that a small ranch of one hundred and sixty acres sold for fourteen thousand dollars; not all alfalfa, had a lot of pasture land and wild grass. (Trans., p. 175.)

The witness Woodard testified to the sale of three hundred and twenty acres for thirty thousand dollars and only about half of it was improved. The balance was not any better than the hill land around the Warm Springs Ranch. (Trans., p. 188.)

The witness Davis testified that he sold a place to Mr. Howard above Drewsey containing three hundred acres for thirty thousand dollars and only one hundred and fifty acres of it was producing hay. The balance of it was common raw land. (Trans., p. 117.)

The witness Daly testified to this same sale (Trans., p. 230), and likewise the witness Howard (Trans., p. 238.)

The witness Love testified that raw sagebrush land without any water was selling around Vale from eighty to one hundred and twenty-five dollars an acre; that the only prospect it had of getting water was what water it would get from the Warm Springs reservoir and the purchaser would have to pay for that. (Trans., p. 337.)

The witness Hunt testified that around his place alfalfa land sold for from one hundred and seventy-five dollars to three hundred dollars an acre. (Trans., p. 400.)

The witness Weaver admitted that there was no difference whatever between the company's land which the plaintiff's witnesses appraised from one dollar and a quarter to ten dollars an acre and the

Drinkwater eighty immediately adjoining it, which was sold for thirty-three hundred dollars. (Trans., p. 419.)

Greig sold his alfalfa ranch at two hundred and forty-one dollars an acre and another one at one hundred and seventy-four dollars an acre, and he admitted that alfalfa land was selling as high as four hundred dollars an acre. (Trans., p. 443.)

In view of these facts we respectfully submit that there was at all events a sharp conflict in the evidence as to the value of this ranch for agricultural purposes; that the evidence largely predominated in favor of the defendant, and that for that reason the errors complained of were extremely prejudicial, and that the judgment should be reversed and a new trial granted.

Respectfully submitted,

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APPENDIX.

In the District Court of the United States for the District of Oregon.

PACIFIC LIVE STOCK COMPANY,
Complainant,

VS.

WARM SPRINGS IRRIGATION DISTRICT ET AL.,
Defendants.

Portland, Oregon, Monday, February 9, 1920.
R. S. BEAN, District Judge:

In December, 1919, judgment was entered in this court appropriating to defendant, its successors and assigns, certain lands belonging to the plaintiff for reservoir purposes. Thereafter the defendant, assuming that it thus obtained the fee simple to such lands and the improvements thereon, entered into a contract with the defendant Stanfield for the sale to him of the improvements and for the leasing to him of so much of the land as will not be covered from time to time by the water of the defendant's reservoir. The object of this suit is to enjoin the performance of such contract.

The question thus presented is whether under the laws of this state the defendant acquired, by the judgment of condemnation, a mere easement in the property or the fee simple title. There is nothing in the complaint in the condemnation suit indicating an intention to condemn the fee, or anything more than the right to overflow the land for reservoir purposes, nor does the judgment in terms award anything more.

The laws governing the organization of Irrigation Districts provide that the Board of Directors thereof may acquire by lease, purchase or condemnation lands and water rights, easements and other property necessary for the construction, use, supply, maintenance, repair and improvement of any canal or canals, or works proposed to be constructed by said Board, and may also so acquire lands and all necessary appurtenances for reservoirs and the right to store water. In acquiring the property and rights by condemnation, the Board shall proceed in the name of the District under the provisions of the laws of the state. The legal title to all property so acquired shall be vested in the Irrigation District, and be held by it in trust for the uses and purposes set forth in the law. (Laws 1917, 743; Laws 1919, 443.)

The general laws of the state provide for the acquisition of lands or easements therein by condemnation and declare that upon the payment into court of the damages assessed the court shall give judgment appropriating the lands, properties, rights, easements, etc., to the corporation, and thereafter the same shall be the property of such corporation. (Lord's Ore. Laws, sec. 6866.)

There are no express words in any of these statutes authorizing the acquisition by condemnation of the fee to land intended for reservoir purposes, and it will not be implied that any greater interest or estate can be thus taken than is necessary to satisfy the requirements of the District. The purposes of the statute and the needs of the District are fully satisfied by the taking of an easement or right to overflow the

land, and that is all in my judgment the defendant acquired or could have acquired by the judgment of condemnation. (*Oregonian Ry. Co.* vs. *Hill,* 9 Ore. 377; *O. R. N. Co.* vs. *Oregon Real Estate Co.,* 10 Ore. 444; 15 Cyc. 1018.) The title to the land in question and the improvements thereon remained in the plaintiff, subject to the right of the Irrigation District to use and occupy the same for reservoir purposes. (15 Cyc. 1021.)

It is claimed that chapter 138 of the laws of 1919 empowers the District to make the contract in question. That statute has no bearing on the instant case. It simply authorizes an Irrigation District to sell and dispose of property acquired by gift, purchase or by right of eminent domain which, by reason of a subsequent change in the plans of the District or other reason, is no longer necessary for the purposes for which it was acquired. No such state of facts appear here. There has been no change in the plans of the District since the judgment of condemnation by which it no longer requires the use of the property for the purposes for which it was condemned.

Injunction will issue as prayed for.